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Supreme Court, U.S.
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No. 96-183

In The

Supreme Court of the United States

October Term, 1995

Michael Leroy DOLIHITE, individually and as father and next friend of David Michael Dolihite, *et al.*,

Petitioners,

v.

Royce KING, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a United States Court of Appeals have jurisdiction of interlocutory appeals taken from orders denying qualified immunity to state actors that raise issues of clearly established law, even if a dispute may also exist regarding whether a public official's actions were lawful *vel non*?

2. Does a United States Court of Appeals have the power, in resolving qualified immunity issues on interlocutory appeal, to review the record and to determine thereafter whether an appealing defendant's conduct met clearly established constitutional norms?

3. Is a "bright line" standard for determining a state actor's qualified immunity, which requires that for liability to attach, pre-existing law must compel a conclusion that what a defendant is doing violates federal law in the circumstances, consistent with this Court's qualified immunity jurisprudence?

LIST OF PARTIES TO THE JUDGMENT BELOW AND RULE 29.6 STATEMENT REGARDING PARENT COMPANIES AND SUBSIDIARIES

The following parties to the judgment below were appellees in the court of appeals and are petitioners before this Court:

Michael Leroy Dolihite (also known as Wayne Michael Dolihite)

Joyce Mary Dolihite

The following parties to the judgment below were appellants in the court of appeals and are respondents before this Court:

Anthony Dykes

Chester M. Jenkins, M.D.

Karen Jurls

Royce G. King

Bradley Mazick, M.D.

Medical Money Management, Inc.

Andrew McBride

Emmett Poundstone, III

Mary Fay Videon, as Executrix of the Estate of Bob R. Maughon, M.D.

One corporation, Medical Money Management, Inc., is a respondent in this cause. Its corporate parent is Medical Management, Inc., which was not a party in the court of appeals.

LIST OF PARTIES TO THE JUDGMENT BELOW AND RULE 29.6 STATEMENT REGARDING PARENT COMPANIES AND SUBSIDIARIES – Continued

At all relevant times, Dr. Bob R. Maughon (whose estate is a respondent in this action) and Dr. Chester Jenkins were principals in a professional corporation organized under the laws of Alabama, Neuropsychiatry Associates, P.C., which was also not a party in the court of appeals.

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The opinion of the United States District Court for the Middle District of Alabama in this cause is styled *Dolihite v. Videon,* and is reported at 847 F. Supp. 918. The opinion of the United States Court of Appeals for the Eleventh Circuit is styled *Dolihite v. Maughon,* and is reported at 74 F.3d 1027.

JURISDICTION

The petition seeks review of a final judgment of a United States Court of Appeals pursuant to 28 U.S.C. § 1254(1) (1988). The court of appeals possessed jurisdiction over the district court's interlocutory order denying qualified immunity to the respondents by virtue of *Mitchell v. Forsyth,* 472 U.S. 511 (1985), which declared such denials immediately appealable. Original jurisdiction of petitioners' civil rights claims under 42 U.S.C. § 1983 lay in the district court on the basis of 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The pertinent judgment of the court of appeals was entered on January 23, 1996, and petitioners' application for rehearing in that court was denied on March 21, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' child was involuntarily referred to a mental health facility by order of a state tribunal; as such, the sole constitutional provision involved is the Fourteenth Amendment. *See Youngberg v. Romeo,* 457 U.S. 307

(1982). The federal statutory basis for petitioners' claim in the district court for alleged deprivations of their constitutional rights was 42 U.S.C. § 1983. The text of both the Fourteenth Amendment and 42 U.S.C. § 1983 is set forth verbatim as Appendix A to the petition for certiorari. A. 1-2.

STATEMENT OF THE CASE

1. ***Factual Background***:

Dr. Bob R. Maughon (whose personal representative, Mary Fay Videon, is a respondent in this action)[1] and respondent Dr. Chester M. Jenkins were, at all times pertinent to the events giving rise to this action, psychiatrists in private practice in Auburn, Alabama in the employ of respondent Medical Money Management, Inc. Prior to 1992, when all pertinent events occurred, Medical Money Management entered into a contract with a state agency, the Alabama Department of Mental Health and Mental Retardation (the Department), to provide psychiatric services at the Department's Eufaula Adolescent Center (Eufaula). Under this contract, the parties agreed that Doctors Maughon and Jenkins would, *inter alia*, provide the Eufaula facility their psychiatric services on an as-needed *consulting basis*, admit residents to Eufaula and

[1] Dr. Maughon died during the pendency of proceedings in the district court. The personal representative of his estate and executrix of his will, Mary Fay Videon, was substituted as a defendant in his stead.

determine their admitting diagnoses, write initial treatment plans and prescribe medication, and perform medication reviews. Undisputed deposition testimony confirms that the functions Doctors Maughon and Jenkins were contractually obligated to perform at Eufaula as to admitted patients were to manage and prescribe medication and to consult with patients referred by the Eufaula staff; conversely, it was the role of other parties, i.e., the on-site psychologists and therapists at Eufaula, to engage in therapeutic and behavioral management of patients. A. 83-84, 110-11.

Petitioners' son David Dolihite came to Eufaula after he had been declared a "minor in need of supervision" by the Baldwin County Juvenile Court at the insistence of petitioners and after numerous reported incidents of his aggressive behavior. He was placed in the custody of the Department with instructions to return him to petitioners upon successful completion of the program at Eufaula. Upon referral to Eufaula, David was evaluated by, among others, respondent Dr. Maughon, who recognized that David had made a suicidal threat several months before and noted that David stated that he "got suicidal" when angered. David was assessed as giving the diagnostic impression of conduct disorder, solitary aggressive type; as a result, Dr. Maughon prescribed monitoring, therapy, education, and physical education as appropriate interventions, but did not recommend psychotropic medication. Soon thereafter, David's treatment team, which consisted of a Department social worker (respondent Karen Jurls), a Department psychologist (respondent Andrew McBride), a consulting psychiatrist (respondent Dr. Jenkins), and others, placed David under a master

treatment plan that noted David's suicidal ideation and gestures and prescribed weekly individual and group therapy sessions with Karen Jurls as responses. A. 42, 89-91.

David proved to be a most uncooperative resident at Eufaula, injuring himself on a number of occasions. At one point, he cut his arm with a piece of metal, then removed sutures that had bound the wound and threatened to commit suicide. Faced with this rebellious behavior, the Eufaula staff telephoned Dr. Jenkins, who prescribed administration of a tranquilizer and authorized the use of soft restraints if the qualified mental health professional on duty at Eufaula at the time agreed. Ten days later, after David had reinjured himself by inserting a pencil in his wound, he was referred by the treating emergency room doctor to Dr. Jenkins for evaluation for anti-psychotic medication. In connection with his evaluation, Dr. Jenkins reviewed David's case with his nurse and his therapist, and ultimately noted that although David had been engaging in self-destructive behavior, there was no current or past evidence of psychosis, and that his thought was orderly and his affect was indifferent. Dr. Jenkins evaluated David as exhibiting non-suicidal, self-destructive behavior for which there was some explanation, i.e., that it related to David's anger or frustration and that it was done in a manipulative fashion. Dr. Jenkins concluded that David's problem was behavioral and that it did not necessitate administration of psychotropic drugs. A. 92-93, 111-12.

The only other contact that either Medical Money Management-affiliated consulting psychiatrist had with David's case was two days later, when David had

destroyed Department property and had threatened to cut himself with a piece of glass. At the time that Dr. Maughon was consulted by telephone by the Eufaula duty nurse regarding David, he had been placed in seclusion for this behavior and was beating his head against a wall and cursing loudly. Dr. Maughon prescribed administration of a tranquilizer under the circumstances. A. 95, 123-24.

Apart from these instances, Doctors Jenkins and Maughon played no role in David Dolihite's treatment. These limited contacts of Doctors Jenkins and Maughon with David's case are consistent with the Medical Money Management contract with the Department to provide consulting psychiatric services. After a resident at Eufaula was admitted, the psychiatrists were obligated only to follow up on patients in order to perform medication reviews. It was the role of other persons, namely Department employees at Eufaula, to make decisions whether or not to place a resident under heightened observation as an anti-suicide measure. A. 104, 106, 111, 115.

On March 24, 1992, David was on close observation by the Eufaula staff when respondent Jurls issued an order taking David off close observation. After a meeting with Eufaula's clinical director, David attempted to commit suicide, hanging himself in his dormitory room closet by a shoestring. Due to hypoxia brought on by his unsuccessful suicide attempt, David suffered severe brain damage. A. 83, 96-97.

2. ***Proceedings Below***:

Petitioners individually and petitioner Michael Leroy Dolihite as next friend of David Dolihite originally commenced this civil rights action in the United States District Court for the Middle District of Alabama against respondents Dr. Chester Jenkins, Andrew McBride, Karen Jurls, Dr. Bradley R. Mazick (clinical director of Eufaula), Anthony Dykes (director of Eufaula), Emmett Poundstone (associate commissioner of the Department), and Royce King (commissioner of the Department), as well as the late Dr. Bob R. Maughon and both the Department and Eufaula *eo nomine*. Later added as defendants were respondents Medical Money Management, Inc., Medical Management, Inc., and Neuropsychiatry Associates, P.C.; the latter two were not appellants in the court of appeals and are thus not parties to the judgment made the basis of the petition. After Dr. Bob R. Maughon's untimely death, his personal representative (respondent Mary Fay Videon) was substituted as a party defendant. A. 40, 82-84.

Petitioners' complaint, as amended, sought damages pursuant to 42 U.S.C. § 1983 for alleged injuries to David's constitutional rights, and also purported to state claims arising under Alabama common law. After discovery was completed, respondents Medical Money Management, Dr. Jenkins, Videon (by then substituted for Dr. Maughon), McBride, Jurls, Mazick, Dykes, Poundstone and King all moved for summary judgment on qualified immunity grounds. The district court granted summary judgment on the state-law claims, but denied summary judgment as to the federal claims. As to respondents Medical Money Management and Doctors Maughon and

Jenkins, the district court proclaimed that "[b]ecause there is expert testimony that Drs. Maughon and Jenkins exhibited deliberate indifference or an absence of medical judgment in their treatment of David, the motion for summary judgment of Drs. Maughon and Jenkins, and Medical Money Management on the ground of qualified immunity is denied." A. 60, 84.

All respondents thereafter appealed the denial of summary judgment on qualified immunity grounds to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed the lower court's denial of qualified immunity as to respondent Jurls, a Eufaula social worker and David's primary therapist, but reversed the district court's denial of qualified immunity as to all other respondents, including Videon, Dr. Jenkins and Medical Money Management. All three panel judges concurred in these reversals, although one judge would have reversed as to Jurls as well. A. 82-84, 137, 138-40.

The court of appeals, in rendering its decision, first carefully considered at length the preliminary matter of its own appellate jurisdiction in spite of the absence of any objection to jurisdiction raised by the petitioners below prior to judgment. The appellate court noted that the posture of the case before it was distinguishable from that of *Johnson v. Jones*, 115 S. Ct. 2151 (1995), in which the Court had limited interlocutory appellate review of qualified immunity denials when all that was at issue was whether particular conduct did or did not occur. The court of appeals noted that in contrast to *Johnson*, each respondent had argued on appeal that his or her conduct as demonstrated by the record was within established constitutional norms of which a reasonable person should

have known, in light of the information possessed by each official at the time. Because this argument raised the core qualified immunity issue, the court of appeals reasoned that it had the power to determine the relevant actions of each respondent and the relevant information possessed by each, taking all reasonable inferences in favor of petitioners. It based this determination on the twin bases that (1) the core qualified immunity issue encompassed these sub-issues and (2) the court's pendent appellate issue jurisdiction allowed consideration thereof because the actual facts and knowledge of the officers were "inextricably intertwined" with the core qualified immunity issue. A. 86-89.

The court of appeals thus conducted an exhaustive review of the record to determine the knowledge of and the actions of each appellant as well as the law governing their actions. In doing so, the court of appeals relied in part upon its *en banc* holding in *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146 (11th Cir. 1994). The court of appeals addressed the holding in *Lassiter* in two principal instances: at one point, the court cited *Lassiter* for the propositions that "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about) the conclusion for every like-situated reasonable government agent that what defendant is doing violates federal law *in the circumstances*" (emphasis in original), and that officials need not "be creative or imaginative in drawing analogies from previously decided cases." In a second instance, the court of appeals cited *Lassiter* for the proposition that a plaintiff when qualified immunity is raised cannot rely upon general propositions or abstractions to demonstrate a violation of

clearly established law; rather, the facts of the controlling precedent must be materially similar to those in the instant case. A. 89-90, 101.

After setting forth the basis of its jurisdiction and of the relevant showing that petitioners were required to make to overcome qualified immunity, the court of appeals considered the acts of each individual state actor seriatim. With respect to Dr. Jenkins, for example, the court of appeals assessed his actions and his knowledge in the light most favorable to the petitioners and then turned to prior circuit case law to assess whether a reasonable mental health professional would have known whether his or her actions violated federal law.[2] The court of appeals identified three relevant circuit precedents[3] involving psychiatric professionals acting under color of state law and concluded that despite an expert's conclusory opinion to the contrary, Dr. Jenkins's actions of record did not constitute such a departure from professional judgment that a reasonable professional would have known that his actions violated David's constitutional rights. The court reached a similar conclusion as to

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[2] While the court of appeals utilized pertinent authorities decided in the context of actions alleging "deliberate indifference" to the psychiatric care of incarcerated persons, a standard which is derived from the Eighth Amendment (*Estelle v. Gamble*, 429 U.S. 97 (1976)), the court of appeals reasoned that actions of a mental health professional which would violate a prisoner's Eighth Amendment rights would also violate the due process rights of the involuntarily civilly committed. A. 102.

[3] These were *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990); *Rogers v. Evans*, 792 F.2d 1052 (11th Cir. 1986); and *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989).

Dr. Maughon, the only other Medical Money Management professional involved with David's case. A. 111, 124. A similar analysis was undertaken with respect to all of the appellants, resulting in a finding that the district court was due to be reversed as to all appellants save Jurls. A. 103-110, 124-37.

Petitioners subsequently sought rehearing and rehearing en banc in the court of appeals. In their rehearing brief below, petitioners raised for the first time the issue of the appellate court's jurisdiction, relying (as here) on this Court's opinion in *Johnson*. However, at no time did petitioners note any quarrel with the court of appeals' application of the standards set forth in its *Lassiter* opinion. Despite Petitioners' arguments, however, the court of appeals denied rehearing on March 21, 1996, which precipitated the petition for writ of certiorari. A. 36-37.

REASONS FOR DENYING THE WRIT

I. The judgment of the court of appeals does not conflict with this Court's opinions pertaining to interlocutory appellate jurisdiction of orders denying qualified immunity.

Petitioners assert that the court of appeals impermissibly exercised jurisdiction in this case. In support of their contention in this regard, they rely principally upon *Johnson v. Jones, supra,* 115 S. Ct. 2151 (1995), a case which was decided during the pendency of the appellate court's consideration of respondents' appeals. Of course, the court of appeals has already considered the proper scope

of *Johnson* and concluded that it possessed jurisdiction over respondents' appeals. It is these respondents' contention that the court of appeals correctly interpreted *Johnson*'s limited holding and that no conflict exists between the judgment below and *Johnson*, particularly in light of the Court's subsequent opinion in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). Moreover, petitioners' additional arguments that they choose to group under their first principal heading do not even hint at a decisional conflict worthy of this Court's consideration.

As *Johnson* is the principal opinion of this Court that petitioners claim is in conflict with the judgment of the court of appeals, a brief examination of it is warranted. In *Johnson*, plaintiff alleged that five named police officers had violated his constitutional rights by using excessive force in arresting him and by beating him at a police station. Three of these officers moved for summary judgment on the limited factual ground that whatever evidence that the plaintiff might have concerning their fellow defendant officers, there was no evidence that *they* had beaten him or had been present while others beat him. Plaintiff's deposition, however, contained evidence that the moving officers *had*, in fact, used excessive force in arresting him and later at the station and all three movants testified that they were present at the arrest and in or near the room at the station where plaintiff was taken. The district court denied summary judgment to the moving officers, holding that there was sufficient circumstantial evidence supporting the plaintiff's allegations and that case law in its circuit indicated that the alleged conduct constituted a clear violation of established law.

The court of appeals dismissed the moving officers' subsequent interlocutory appeal, stating that it lacked appellate jurisdiction of the evidence insufficiency contention that the moving officers "didn't do it." 115 S. Ct. at 2153-54.

On certiorari, this Court affirmed. *Johnson* squarely provides that a summary judgment order that determines *only* a question of "evidence insufficiency," i.e., which facts a party may or may not be able to prove at trial, does not constitute an appealable interlocutory order. 115 S. Ct. at 2156. Significantly, *Johnson* did not overrule *Mitchell v. Forsyth, supra*, 472 U.S. 511 (1985), which as *Johnson* states had held immediately appealable a denial of a motion for summary judgment where (1) the defendant asserted qualified immunity and (2) the issue on appeal concerned whether certain facts showed a violation of clearly established law.

Petitioners claim that these respondents did not raise any issues regarding what constituted clearly established law under the circumstances presented. Pet. Cert. 10-13. This argument distorts the true circumstances of these respondents' appeal, which was actually predicated on two bases. The petition's selective quotation, out of context, of these respondents' arguments below regarding their positions on certain factual disputes does not take into account that *the petitioners and these respondents were also in dispute as to the governing law that was "clearly established"*.

Even in the district court, the issue of the "clearly established law" was debated at length. For their part, petitioners contended that *Wyatt v. Stickney*, 344 F. Supp.

387 (M.D. Ala. 1972), *aff'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), had "addressed the scope of constitutional guarantees accruing to the patients in Eufaula" (Record vol. 2 doc. 61 at 9). Later, in response to these respondents' contentions that neither a district court opinion or remedial decree could clearly establish constitutional law in the immunity context, petitioners again contended that the *Wyatt* standards governed the case rather than *Youngberg v. Romeo, supra*, 457 U.S. 307 (1982), and that *Wyatt* was clearly established law (Record vol. 3 doc. 97 at 5). Finally, while the district court did not directly apply *Wyatt* in evaluating Doctors Maughon and Jenkins's conduct (*compare* A. 53-60 *with* A. 68-73), the issue of whether *Wyatt* or *Youngberg* constituted "clearly established" law was again disputed by the parties on appeal from the district court's judgment in the court of appeals (*see* appellate br. of Videon, et al., at 25-30; appellate br. of petitioners at 20, 25; appellate reply br. of Videon, et al., at 2-3).

In addition to this explicit dispute concerning the necessity of clear establishment of controlling law, these respondents also protested before the court of appeals the district court's incorrect reliance upon raw and conclusory expert testimony instead of settled circuit case law to demonstrate clear establishment of constitutional norms. While the district court correctly stated that the psychiatrists' actions depended upon medical judgments, it erroneously concluded that the affidavit of petitioners' expert could serve the function of demonstrating that the governing law was clearly established. A. 56. Respondents objected in the court of appeals to this blatant misuse of post hoc expert testimony to "clearly establish"

the law governing their actions in 1992 regarding David's condition, citing *Society for Goodwill to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1248-49 (2d Cir. 1984), for the proposition that constitutional norms are not to be determined by the professional judgment of trial experts. Reply appellate br. of Videon, et al., at 6. The district court's errors in its methodology in ascertaining the pertinent constitutional norms were thus clearly before the court of appeals as well. Therefore, petitioners' contention that the court of appeals had no jurisdiction over the appeals of respondents Jenkins and Videon (and implicitly Medical Money Management) is wholly baseless.

Moreover, just last Term this Court, in *Behrens v. Pelletier, supra*, 116 S. Ct. 834 (1996) noted that *Johnson* is extremely limited in scope as precedent. As *Behrens* states, "*Johnson* surely does not mean *every* denial of summary judgment is nonappealable." 116 S. Ct. at 842 (emphasis in original). Furthermore, "*Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an abstract issue of law relating to qualified immunity." *Id.* In this instance, the court of appeals did precisely that, noting its *Lassiter* standard that "pre-existing law must dictate . . . the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." A. 101 (emphasis in original). In effect, the court of appeals rejected both petitioners' and these respondents' contentions in this regard, holding that "[a]lthough *Romeo* [upon which these respondents had relied] establishes that the involuntarily civilly committed have certain due process rights and that those

rights are at least as extensive as the rights of the criminally institutionalized, that broad legal truism is insufficient to clearly establish the law for purposes of overcoming the [respondents'] qualified immunity claims in this case." *Maughon*, 74 F.3d at 1041. The court of appeals thus correctly noted that this issue of the controlling case law was a "core immunity issue" over which it had jurisdiction. A. 86. In addition, the court of appeals carefully scrutinized petitioners' expert affidavit and agreed with these respondents that it was of no help in resolving the qualified immunity issue. A. 114-18. This, too, resolves a core immunity issue.

Because the controlling case law said to "clearly establish" constitutional rights was made an issue by the parties to the litigation, and because these respondents raised the district court's flawed methodology in resolving the clearly established law issues, the court of appeals correctly proceeded to resolve the precise actions and precise knowledge of these respondents, as well as those of the other appealing parties. A. 87 (citing unanimity of the circuits on this issue). Indeed, both *Johnson* and *Behrens* stand for the proposition that the courts of appeals may have to undertake cumbersome reviews of the record to determine the facts the district courts (in the light most favorable to the non-moving parties) likely assumed. *Behrens*, 116 S. Ct. at 842 (citing *Johnson*, 115 S. Ct. at 1259). As the court of appeals noted, it is necessary to examine the precise actions of each state actor and the precise information possessed by each in order to determine whether a reasonable state actor could have believed that his or her actions violated clearly established law. A. 86.

However, even had the court of appeals not had the power to consider directly these facts as part and parcel of the core qualified immunity issue, it certainly had pendent appellate jurisdiction to consider these respondents' precise acts and precise knowledge, as they were inextricably intertwined with the governing legal standard. Contrary to petitioners' contentions, *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995) does not govern the court of appeals' exercise of pendent appellate *issue* jurisdiction under these circumstances, as this Court specifically declared in that case that it was not required to address when a court of appeals with jurisdiction over one ruling might review rulings that are not themselves independently appealable. *Swint*, 115 S. Ct. at 1212. In addition, while petitioners contend that *Johnson* forecloses pendent issue jurisdiction to identify pertinent facts relevant to the clearly established law inquiry, the Court's discussion in that case simply notes that the circuits would most likely not assume pendent appellate jurisdiction where the appealable issue appears simply a means to lead to review of underlying factual matter. *Johnson*, 115 S. Ct. at 2159. These respondents certainly did not bring their appeals in an effort to avoid *Johnson*; indeed, as petitioners admit, the appeals were taken over a year before *Johnson* was decided (Pet. Cert. 13). Furthermore, as even petitioners concede that the appeal by respondent Dr. Bradley Mazick involved the legal issue of the absence of a clearly established constitutional right (Pet. Cert. 6), which would necessarily have entailed a cumbersome identification of *his* actions and knowledge with respect to David Dolihite in light of the district court's inadequate identification thereof (A. 88), there

was no disutility in concurrently conducting a similar review of the actions of Doctors Maughon and Jenkins as well pendent to their controlling law issue on appeal. Thus, petitioners have shown no conflict with *Johnson* such that this Court's writ of certiorari should issue.

Notably, the petition in this action is also flawed in one other significant respect: it ignores this Court's intervening decision in *Behrens* addressing the breadth of *Johnson*'s holding regarding appellate jurisdiction. *Behrens* specifically notes that a state actor is permitted to claim on appeal that all of the conduct deemed sufficiently supported for purposes of summary judgment meets the standard of objective legal reasonableness. 116 S. Ct. at 842. That is precisely what these respondents claimed in this case: the court of appeals was apprised by these respondents of both the limited role played by consulting psychiatrists at Eufaula under the Medical Money Management contract and the specific incidents in which these respondents were called upon to provide services under their contract. Certainly, *Behrens* makes clear that respondents were well within their rights to claim that their conduct in its entirety was objectively reasonable under the law. As a result, the petition does not allege a true conflict with this Court's precedents in this regard.

Petitioners' remaining contentions within their first argument heading consist primarily of allegations of erroneous factual findings by the court of appeals or the misapplication of the doctrine of discretionary pendent appellate issue jurisdiction. This Court's Rule 10 states that in such circumstances, a petition for certiorari is "rarely granted." Surely, whether the court of appeals

incorrectly denoted petitioners' expert affidavits as "conclusory" (Pet. Cert. 17), whether the court of appeals allegedly made "impermissible inferences" from the evidence (Pet. Cert. 18), and whether the Eleventh Circuit has inconsistently applied its intramural discretion to exercise pendent appellate issue jurisdiction (Pet. Cert. 21) do not constitute such "compelling reasons" for the grant of certiorari as Rule 10 envisions. As this Court held in *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70 (1955), when construing Rule 10's predecessor, the Court's issuance of certiorari should be limited to problems beyond the academic or the episodic. As these last, desperate sub-issues (which point to no inter-circuit or U.S. Supreme Court conflict) underscore, this Court's extraordinary review of the judgment of the court of appeals would constitute a needless waste of its finite resources as the ultimate arbiter of important federal constitutional and statutory questions.

II. The court of appeals' application of a bright line test of qualified immunity does not contravene this Court's immunity jurisprudence.

Petitioners' second and final alleged ground for the issuance of the writ of certiorari is a claimed conflict between the judgment below and this Court's opinions in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsyth, supra*, 472 U.S. 511 (1985). In their view, the court of appeals espoused a position that "thwart[s] the constitution" because it requires demonstration that every like-situated governmental official violates federal law in the same circumstances by the same actions. Pet. Cert. 27.

However, this issue is not one which petitioners have raised in any court below. Admittedly, the principal case upon which the court of appeals relied in framing this standard, *Lassiter v. Alabama A & M Univ., Bd. of Trustees, supra*, 28 F.3d 1146 (11th Cir. 1994), was decided during the pendency of the case in the court of appeals. Nevertheless, petitioners failed to raise below any conflict between the court of appeals' judgment and *Harlow* or *Mitchell*, choosing instead to address only jurisdictional issues in their petition for rehearing. This waiver of any conflict between the two courts warrants this Court's declension of consideration of the alleged conflict. *See FTC v. Grolier, Inc.*, 465 U.S. 848, 850 n.3 (1984); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Demarest v. Manspeaker*, 498 U.S. 184, 189 (1991).

Even were this Court to exercise its discretion to declare this an "exceptional case" and reach this waived issue, *see Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2219 (1995), this ground would not warrant certiorari review. *Harlow*'s formulation of qualified immunity shields government actors insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person *would have known*." 457 U.S. at 818 (emphasis added). *Mitchell*, in pertinent part, restates this formula. 472 U.S. at 524. However, this Court has held that this standard is not to be applied at the high level of generality that petitioners might prefer:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right

> must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of the pre-existing law the unlawfulness *must be apparent*.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added). This formulation, while not including the term "bright line" as used by the court of appeals, does reflect that a mere allegation of constitutional violations by state mental health officials and adjunct professionals is not remotely enough to overcome their qualified immunity. The *Lassiter* gloss on this Court's holding in *Anderson*, far from requiring an identical case as petitioners claim, merely requires reference to concrete principles, just as *Anderson* does; under the *Lassiter* test, a reasonable official must have known at the time that what he or she did violated a constitutional right of the plaintiff for liability to attach. There is no inconsistency between the court of appeals' formulation of qualified immunity and this Court's.

Petitioners complain that under the court of appeals' test, they will be required to show a "pre-existing case under the same set of facts and circumstance[s]." Pet. Cert. 26. Neither *Lassiter* nor *Anderson* even purports to require this. *Lassiter*, 28 F.3d at 1150; *Anderson*, 483 U.S. at 640. What *Anderson* and *Lassiter* both require is that all reasonable state actors would understand that the challenged action violates federal law rights. *Lassiter*, 28 F.3d at 1149; *Anderson*, 483 U.S. at 640. The facts of the case relied upon as clearly establishing the law need not be

the same, but should be materially similar, qualified immunity being a doctrine that protects all but the plainly incompetent or those who knowingly violate the law. *Lassiter*, 28 F.3d at 1150; *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Petitioners' claims of conflict between this Court's opinions regarding qualified immunity and the judgment below are not well taken. No amount of labelling of certain amorphous rights as "self-evident" can substitute for analysis of the particularized contours of the right claimed. Neither *Anderson* nor the values espoused by this Court in *Harlow* – limiting the distraction of state actors from their duties, the inhibition of discretionary action, and the deterrence of able people from public service (457 U.S. at 816) – allow for liability to be affixed under circumstances less particularized than those set forth in *Lassiter*, as petitioners would advocate. Certainly, in cases arising from the field of mental health, wherein this Court has mandated that courts must show deference to the judgment of qualified professionals (*Youngberg, supra*, 457 U.S. at 322), the conclusion that case law should concretely map out a bright line is all the more sound and logical.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted this the 3rd day of September, 1996.

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